

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

NORDSTROM, INC.

and

Case 19-CA-29729

UNITE HERE, LOCAL 71JT, HOTEL
EMPLOYEES AND RESTAURANT
EMPLOYEES UNION¹

Susannah Merritt, Atty, and Ann Marie Cummins, Atty,
of Seattle, Washington, for the General Counsel
J. Markham Marshall, Atty, and Karin E. Valaas, Atty, of
Seattle, Washington, for the Respondent
David Rosenfeld, Atty, of Oakland, California for the
Charging Party, *Barbara Mejia, Unite Here,*
Western States Regional Joint Board (Secretary/
Treasurer), *Elizabeth Freeman, Unite Here,*
Local 71JT

DECISION

I. STATEMENT OF THE CASE

Mary Miller Cracraft, Administrative Law Judge: Pursuant to a Complaint and Notice of Hearing² issued on August 30, 2005,³ the General Counsel alleges that Nordstrom, Inc. (Respondent) issued disciplinary warnings to three employees, Yvonne Chung, Thomas Luis, and Jose Luciano, and issued a low score on a component of Chung's annual evaluation, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.⁴ Respondent timely denied the General Counsel claims.

¹ The name of the Union appears as stipulated by the parties at trial.

² The complaint was based upon a charge and amended charge filed by United Here, Local 71JT, Hotel Employees and Restaurant Employees Union (the Union) on April 12 and June 29, 2005, respectively. Trial took place on November 15, 2005, in Seattle, Washington.

³ All dates are in 2005 unless otherwise referenced.

⁴ Sec. 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §158(a)(1), provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Sec. 7 of the Act; to wit, as relevant here, to act together in concert regarding wages, hours, and terms and conditions of employment; self-organize; to form, join, or assist labor organizations; to bargain collectively; and to refrain from any or all such activities. Sec. 8(a)(3) of the NLRA, 29 U.S.C. §158(a)(3) provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

On the entire record, including my observation of the demeanor of the witnesses,⁵ and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

II. FINDINGS OF FACT

The relevant facts are not in dispute.

1. Respondent is a State of Washington corporation with a place of business in Bellevue, Washington, where it is engaged in the retail sale of a wide range of apparel, shoes, and accessories for women, men, and children.
2. Maryam Aghdassi, a Fitter/Tailor at Respondent's Bellevue Square Store, testified on behalf of Respondent at an NLRB hearing on December 17, 2004, regarding Respondent's Objections to Conduct Affecting a Decertification Election.
3. Thereafter, for a period of, at most, two weeks, Bellevue Square Fitters/Tailors Yvonne Chung, Thomas Luis, and Jose Luciano did not speak to Aghdassi.

Their supervisor explained, "when Maryam Aghdassi would have walk in nobody would say hi to her . . . if somebody was at work and they would say hi, how are you doin', but they were not talking to Maryam, as she is in the room. They were ignoring her."

4. Chung, Luis, and Luciano were disciplined with "opportunity checks" because Respondent believed they concertedly stopped talking with Maryam Aghdassi due to her testimony on behalf of Respondent at the NLRB objections hearing.

The parties agree that an "opportunity check" is a form of discipline. The parties' collective-bargaining agreement refers to an opportunity check as a written warning.

Yvonne Chung received an opportunity check dated January 19 as follows:

Yvonne, this is an opportunity check for your recent unprofessional behavior in failing to positively and effectively communicate with coworkers. It was recently brought to my attention that you instructed your fellow employees to stop talking to Maryam Aghdassi because of her participation in a recent NLRB hearing. I spoke with several employees and was able to corroborate those allegations.

This behavior shows a serious lack of teamwork and a disrespect for your fellow employees. It has also negatively impacted the morale of the department It is my expectation that you behave in a professional manner and that you treat people with respect in all situations.

⁵ Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or omitted facts, apparent probability, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

I must see immediate and consistent improvement in your teamwork and professional behavior or further disciplinary action will take place up to and including termination.

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There is no evidence that Chung actually instructed other employees not to speak to Aghdassi. I credit the testimony of Chung, Luciano, and Luis in this respect. However, Respondent perceived that the Employees were acting together in support of the Union.

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Jose Luciano and Thomas Luis were the subjects of identical opportunity checks dated January 22, as follows:

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This opportunity check is for Jose's [Thomas'] recent unprofessional behavior in failing to positively and effectively communicate with a fellow employee. Jose [Thomas] admitted that he had stopped talking to his coworker, Maryam Aghdassi, because of her participation in a recent NLRB hearing. This behavior was not only unprofessional but it negatively affected the department's morale. I want to acknowledge that Jose [Thomas] has since apologized to Maryam for his behavior.

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It is my expectation that he behaves in a professional manner and that he treats people with respect in all situations.

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I must see immediate and consistent improvement in his teamwork and professional behavior or further disciplinary action will take place up to and including termination.

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5. There is no dispute that these opportunity checks remain in the employees' personnel files.

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6. On March 9, Chung received her annual performance evaluation which contained an unsatisfactory evaluation in "build[ing] positive team relationships throughout the store and the company." All other employees in the department received the next higher rating. Chung's score was due to the incident involving Aghdassi.

The narrative portion of the teamwork component of Chung's annual performance evaluation states, in part:

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Yvonne needs to focus on professional communication. She has excluded co-workers in conversation which created a negative environment. She received an opportunity check on Jan. 19, 2005 regarding this issue. I have noticed some improvement and I need to see this improvement to continue. I need Yvonne to speak respectfully about her team mates and store employees. She needs to understand that communication is the only key to have a great team work that if there is no such communication there would be no teamwork.

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7. There is no dispute that this annual performance evaluation remains in Chung's personnel file.

8. None of these disciplinary actions state that failure to timely perform alterations contributed to the discipline.

9. There is no evidence that Chung, Luis, or Luciano refused to speak to Aghdassi about work-related matters.

.5 It is undisputed that no specific tailoring work was delayed or impacted by anyone's failure to talk to Aghdassi. Chung agreed that she stopped speaking to Aghdassi socially after the NLRB objections hearing because after Aghdassi testified at the hearing, Chung knew Aghdassi sided with management and Chung did not want to say anything to Aghdassi that might create problems for Chung with management. Moreover, in Chung's experience,
10 Aghdassi did not confer with other fitter/tailors about markings. Chung observed that Aghdassi routinely consulted management for answers to her questions about tailoring.

Supervisor Marita Jones testified that, in one instance, a garment was not completed sufficiently ahead of schedule due Chung's lack of communication with Aghdassi. This incident,
15 however, was not cited in either Chung's opportunity check or annual performance review. Indeed, no drop in productivity or work product delay was ever cited by management in any of Chung's, Luciano's, or Luis' opportunity checks. Further, it is unclear from Jones' testimony that Chung's refusal to speak to Aghdassi was actually the cause of the garment's delay. As a result, this testimony is not convincing on the issue of whether Chung's perceived concerted
20 activity resulted in any work product delay.

III. THE ALLEGED UNFAIR LABOR PRACTICE

By issuing disciplinary warnings to three employees, Yvonne Chung, Thomas Luis, and
25 Jose Luciano, and issuing a low score on a component of Chung's annual evaluation because it believed that these employees concertedly refused to speak to coworker Maryam Aghdassi due to her testimony on behalf of Respondent in an NLRB objections hearing, General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) of the Act .

IV. ANALYSIS

There are two questions at issue: 1) Does a concerted effort to refuse to speak with a coworker who sided with management in a decertification election constitute activity done for the purpose of collective bargaining or other mutual aid or protection? 2) If so, does the
35 concerted activity nevertheless forfeit the protection of the Act? I answer affirmatively to the first question and negatively to the second.

Respondent argues that employees who concertedly refuse to speak to a coworker because the coworker sided with management in a decertification election are not furthering a
40 protected activity "for the purpose of collective bargaining or other mutual aid or protection" and that the concerted refusal to speak to a coworker because of the coworker's support for Respondent in a decertification election does not involve wages, hours and/or terms or conditions of employment. I reject this argument.

45 An employee show of solidarity for the Union may involve verbal and nonverbal activity. Complaints involving non-verbal "cold shoulder" or "silent treatment" strategies between Union supporters and non-supporting coworkers tend to arise during the course of representation elections, or, like in this case, following a decertification attempt. The Board has recognized that "in a hotly contested election, 'a certain measure of bad feeling and even hostile behavior is probably inevitable.'" *In Re Corner Furniture Discount Center, Inc.*, 339 NLRB No. 146, 4 fn. 6 (2003) citing *Cal West Periodicals, Inc.*, 330 NLRB 599, 600 (2000). Such behavior is "no more than the human activities of employees involved in a campaign, on a personal basis. . . . [I]t

expresses the natural desire for people to associate with others of like mind.” *United Builders Supply Co.*, 287 NLRB 1364, 1370 (1988) (dismissing a post-election complaint involving pro-Union employees who had “voted” not to talk to an unsympathetic co-worker).

.5 The refusal to speak to employees who are anti-union is similar to verbal outbursts toward anti-union employees. Such non-verbal solidarity clearly embraces the right to representation by a labor organization and, perforce, relates to wages, hours, and terms and conditions of employment. Moreover, the fact that an employee, such as Aghdassi, may find the show of solidarity distasteful does not privilege Respondent’s discipline.

10 Because the opportunity checks and the performance evaluation set forth a causal connection between the employee show of solidarity and the discipline received by the employees, the only issue left to be determined is whether the concerted refusal to speak to an employee who sided with management in the decertification election loses the protection of the Act. *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); *Mast Advertising & Publishing*, 304 NLRB 819, 820 (1991). This analysis recognizes that employee concerted activity must be balanced against the employer’s right to maintain order and respect. *Piper Realty*, 313 NLRB 1289, 1290 (1994).

20 In order to determine whether employee activity loses the protection of the Act, the Board typically balances four factors to determine the egregiousness of the conduct: (1) the place of the discussion between the employee and the employer, (2) the subject matter of the discussion, (3) the nature of the employee outburst, and (4) whether the outburst was in any way provoked by an employer’s unfair labor practice. See, *Atlantic Steel Co.*, 245 NLRB 814 (1979). Balancing these factors, I find that the employees’ concerted refusal to speak to their coworker who testified against the Union did not cause them to lose the protection of the Act. They simply did not speak to Aghdassi. Thus, there was no discussion and there was no outburst. There is no evidence of abusive or indefensible conduct on the part of Chung, Luciano, or Luis.

30 Further, there is no showing that concerted failure to talk to Aghdassi affected Respondent’s right to maintain order. In *Southwestern Bell Telephone Company*, 276 NLRB 1053, 1053 fn.2 (1985), the Board cited a lack of a “serious threat to discipline” in permitting the posting of Jack London’s “Definition of a Scab” on a Union bulletin board, despite evidence that it caused employees to “[mill] around” or “[talk] in huddles” instead of “working independently at their stations as they normally did.” Here, there is no evidence of a similar type of disruption, there is only the suggestion that one employee was offended by her coworkers’ concerted decision not to speak with her socially. Like in *United Builders Supply Co.*, above at 1370, or *In Re Corner Furniture Discount Center, Inc.*, above at 4 fn. 6, the silent treatment used here does not rise to the level of objectionable conduct.

45 As to Respondent’s right to maintain respect, there is a similar lack of evidence. See, e.g., *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000) (while attempting to engender support among coworkers for union strike, use of word “scab” did not remove protection of Act); *Leasco, Inc.* 289 NLRB 549, 550 (1998) (an employee threatening a supervisor with “If you take my truck, I’m kicking your ass right now” in the course of engaging in concerted activity was not so offensive as to remove the protection of the Act.)

V. CONCLUSIONS OF LAW

Jurisdiction

During the past 12 months, Respondent has derived gross revenues in excess of \$500,000 and purchased and received goods within the State of Washington valued in excess of \$5000 directly from sources outside the State of Washington. Respondent admits and I find that it has been at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Labor Organization Status

Respondent admits and I find that the Union is and has been at all relevant times a labor organization within the meaning of Section 2(5) of the Act.

Unfair Labor Practices Affecting Commerce

By issuing disciplinary warnings to three employees, Yvonne Chung, Thomas Luis, and Jose Luciano, and issuing a low score on a component of Chung's annual evaluation because it believed that these employees concertedly refused to speak to coworker Maryam Aghdassi due to her testimony on behalf of Respondent in an NLRB objections hearing, Respondent violated Section 8(a)(1) and (3) of the Act. These unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

VI. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Respondent remove the opportunity checks from the employees' personnel files and expunge the violative portion of Chung's annual appraisal. I shall also recommend that Respondent be ordered to post a notice setting forth its obligations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

VII. ORDER

Respondent, Nordstrom, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall cease and desist from disciplining employees and issuing a low score on a component of an employee's annual evaluation because it believes these employees concertedly refused to speak to another employee because she testified on behalf of Respondent at an NLRB objections hearing and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

- 5 1. Within 14 days from the date of this Order, remove from its files the January 19
and January 22 opportunity checks of Chung, Luciano, and Luis and remove any
references in its files to these opportunity checks.
- 10 2. Within 14 days from the date of this Order, remove from Yvonne Chung's annual
performance evaluation the "unsatisfactory" evaluation in building positive team
relationships throughout the store and company and replace this with "needs
improvement" and remove any references in its files to the "unsatisfactory"
evaluation.
- 15 3. Within 14 days after service by the Region, post at its Bellevue Square facility in
Seattle, Washington, copies of the attached notice marked "Appendix."⁷ Copies
of the notice, on forms provided by the Regional Director for Region 19, after
being signed by the Respondent's authorized representative, shall be posted by
the Respondent immediately upon receipt and maintained for 60 consecutive
20 days in conspicuous places including all places where notices to employees are
customarily posted. Reasonable steps shall be taken by the Respondent to
ensure that the notices are not altered, defaced, or covered by any other
material. In the event that, during the pendency of these proceedings, the
Respondent has gone out of business or closed the facility involved in these
25 proceedings, the Respondent shall duplicate and mail, at its own expense, a
copy of the notice to all current employees and former employees employed by
the Respondent at any time since January 19, 2006.
- 30 4. Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region
attesting to the steps that the Respondent has taken to comply.

35 Dated: Washington, D.C. March 2, 2006

Mary Miller Cracraft
Administrative Law Judge

⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline our employees or issue a low score on a component of an employee's annual evaluation because employees concertedly refuse to speak to another employee because that employee testified on our behalf at an NLRB objections hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, remove from our files the January 19 and January 22 opportunity checks of Yvonne Chung, Jose Luciano, and Thomas Luis and remove any references in our files to these opportunity checks and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the opportunity checks will not be used against them in any way.

WE WILL, within 14 days of the Board's Order, remove from Yvonne Chung's annual performance evaluation the "unsatisfactory" evaluation in building positive team relationships throughout the store and company with its accompanying narrative and replace this with "needs improvement" and remove any references in our files to the "unsatisfactory" evaluation and WE WILL, within 3 days, notify her in writing that this has been done and that the "unsatisfactory" evaluation will not be used against her in any way.

NORDSTROM, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 2d Avenue, Room 2948, Seattle, Washington 98174–1078, Telephone 206–220–6314.